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No. 85-731

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES L. MAXFIELD
v.
SINCLAIR INTERNATIONAL and DAVID H. SINCLAIR,
President of Sinclair International,
Petitioners

BRIEF IN OPPOSITION TO A GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court below erred in prohibiting the Jury from considering Social Security benefits received by Plaintiff after his employment termination as a set-off against any damages to which the Plaintiff was entitled.

2. Whether the Court below erred in permitting Plaintiff to present evidence and secure recovery for front pay damages beyond the date of the Trial when Plaintiff requested front pay in the Complaint and other appropriate remedies.

3. Whether the Court erred in permitting Plaintiff to present evidence regarding front pay loss without the use of expert testimony when Defendants cannot show any harm and in fact were benefitted by the manner of presentation of the evidence.

4. Whether Plaintiff needs to establish the fact that the Plaintiff was replaced by an employee outside the protected age group, i.e. under age forty (40), or merely establish the fact that plaintiff's replacement was substantially younger, especially in light of the fact that there was direct proof of age discrimination.

PARTIES

All parties to the proceeding in the United States Court of Appeals for the Third Circuit are Noted in the caption of this Brief in Opposition to the Petition for Certiorari.

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THE OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 766 F.2d 788, and appears in the Apendix at A1. The Order of that Court denying rehearing appears in the Appendix at A. The Memorandum Opinion and Order of the District Court for the Eastern District of Pennsylvania is unreported and appears in the Appendix of Appellant's Petition.

STATEMENT OF THE CASE

This case was instituted by Plaintiff under the Age Discrimination in Employment Act, 29 U.S.C.A. §621, *et seq*. It was tried before the Honorable Raymond J. Broderick with a bifurcated Jury in February of 1984. The Trial resulted in a verdict in favor of the Plaintiff and against both Defendants. The damage phase of the Trial resulted in the Jury awarding, by way of special Interrogatories, the amount of $33,398 for past damages and $7,500 for future damages. Subsequent to Trial, the Defendants filed Motions for Judgment Notwithstanding the Verdict and/or For New Trial. On August 8, 1984, the Honorable Raymond J. Broderick filed a Memorandum and Order denying Defendants' Motions. On May 13, 1985, the case was argued in front of the Court of Appeals of the Third Circuit, which affirmed the judgment of the District Court.

STATEMENT OF THE FACTS

The relevant facts are as follows. In May of 1982, Plaintiff filed a Complaint alleging in Count 1 of the Complaint that the Defendants, Sinclair International and David H. Sinclair, violated the Age Discrimination in Employment Act by terminating Plaintiff as a direct result of his age. At the time of Plaintiff's termination, he was sixty-five (65) years and one (1) month old. Plaintiff contended in the Complaint that he was an individual that was in a protected age group and that he was replaced by an individual that was younger in age than the Plaintiff. Further, Plaintiff contended that he was at all relevant times performing his job in a satisfactory manner and that the Defendants terminated him based directly on his age. Plaintiff alleged in his Complaint and proved at Trial that in May of 1980, he was told by his employer, the Defendant, David H. Sinclair, that he was being terminated because he was attaining his sixty-fifth

(65th) birthday that year. Plaintiff contended in his Complaint and proved at Trial that he protested this termination since he planned to work until age seventy (70), but was told by the Defendant, David H. Sinclair, that he would be terminated at age sixty-five (65). Plaintiff turned sixty-five (65) in November of 1980 and one (1) month later, at the end of the year, he was forced to retire. The Complaint requested damages for various reasons, including a request for other legal and equitable remedies as the Court may see fit.

The Defendants denied the Plaintiff's allegations in the Complaint and contended in their Answer and at Trial that the Plaintiff's dismissal was due to poor job performance. It was stated nowhere in the Trial that the Plaintiff had been retained during his last few years so that he would be fully vested in his pension. In fact, the pretextual reason given at Trial by the Defendants was that the Defendants wanted the Plaintiff to be able to retire with full Social Security benefits, which he would not otherwise be entitled to if he retired before age sixty-five (65).

The evidence produced at Trial clearly revealed that Plaintiff was not only adequately performing his job, but in fact was one of the top salesmen in the company, and in a head-to-head comparison with his replacement, had done better than his replacement after adjustments for inflation and territorial changes.

Plaintiff worked for the Sinclair Corporation from 1940 through the end of 1980, and at the end of his termination, received Social Security benefits as Defendants brought out at Trial before the Jury. However, the Honorable Trial Court refused to allow that evidence to be used in the damage phase of the Trial, but merely on the question of Plaintiff's willingness to work in order to mitigate his damages.

At the conclusion of the Trial, the Jury rendered a verdict in favor of the Plaintiff for the damages stated above.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The Court Below properly prohibited the Jury from receiving evidence concerning the Plaintiff's receipt of Social Security benefits after his employment termination as a set-off against the damages to which Plaintiff is entitled.

It is an uncontested fact in the instant case that the Plaintiff throughout his forty (40) year work history with the Defendants contributed to the Social Security fund as required by law. These Social Security benefits are benefits that were vested in the Plaintiff at age sixty-two (62) to which he was entitled as a matter of law once he retired. At age sixty-five (65), Plaintiff would be entitled to his full share of Social Security benefits earned by him based on his contributions. While it might be true that Plaintiff would not have received Social Security benefits but for his termination, that same causation factor could be argued in every litigation involving some collateral source of payment.

In many instances where individuals are injured as a result of the neglience of others, these individuals have purchased disability insurance policies. It can be certainly said in those instances that but for the occurrence or happening of the accident that caused the injury, the injured party would not be eligible for such disability benefits. However, when the issue is tried before a Court and a Jury, the Jury is not permitted to receive any evidence concerning the disability benefits the injured party received based on the long-established principle of the Collateral Source Rule. *N.L.R.B. v. Gullett*, 340 U.S. 361, 71 S. Ct. 337 (1951).

However, Defendants misstate the evidence received by the Jury in this case. Extensive testimony was taken concerning the Plaintiff 's Social Security benefits and the amount he was receiving since his retirement. This testimony was admitted into evidence concerning

the question of Plaintiff 's mitigation of his damages after his termination. Defendants introduced the Social Security benefits to the Jury to try to establish that plaintiff was better off after his termination than before and, therefore, did not mitigate his damages properly. Therefore, the Jury had all of the information before it concerning the amount of money that Plaintiff had received by way of Social Security benefits from the date of his termination until the date of Trial, as well as all of his other earnings. Despite this knowledge, the Jury awarded those sums of money herein before mentioned.

Defendants attempt to reflect that the 1981 earnings received by Mr. Maxfield were in fact higher than his earnings prior to his termination. Of the $30,272.19 received by Mr. Maxfield, approximately $12,000 was from payments received from the pension of Sinclair International and which the Jury was told by Plaintiff to consider as set-offs from Plaintiff 's claims for lost wages during the year 1981. Subsequent to the Trial date, the Third Circuit Court of Appeals decided that neither Unemployment Compensation benefits nor Pension Plan benefits should be deducted from Age Discrimination in Employment Act awards for back pay. *McDowell v. Avtrex Fibers, Inc.*, 774 F.2d 2124 (3rd Cir. 1974); vacated and remanded on other grounds. 105 S. Ct. 1159 (1985). Therefore, Plaintiff in essence reduced the amount of damages presented before the Jury voluntarily when otherwise not required to do so. The Third Circuit has not specifically ruled on the issue of Social Security benefits being allowed as a set-off in Age Discrimination in Employment Act cases. The Defendants cite *Ostapowicz v. Johnson Bronze Company*, 541 F.2d 394 (3d Cir. 1976) as a case supporting their position. However, the *Ostapowicz*, Supra, decision was a confirmation by the Third Circuit of the lower Court's calculations without comment on those calculations. The Lower Court deducted Unemployment Compensation benefits received

in that case. Social Security benefits were not considered. Unemployment Compensation benefits can be distinguished as benefits paid entirely by the employer without contribution by the employee and, therefore, a substitution for wages as opposed to Social Security benefits, which is a social insurance for retirement. However, in light of the *McDowell,* Supra, decision, even Unemployment Compensation benefits would no longer be deductible and, therefore, *Ostapowicz,* Supra, has been tacitly overruled.

The weight of case law throughout the country is in overwhelming support of Plaintiff 's position and opposed to Defendant's arguments. In *Gathercole v. Globas Assocs.* 560 F. Supp. 642 (D.C. Cal. 1983) a Jury was instructed that they were not required to deduct early retirement benefits. In *Whatley v. Skaggs Companies, Inc.,* 707 F.2d 1129 (10th Cir. 1983) that Court held that there shall be no reduction by the Jury based on the collateral source of disability benefits.

Specifically on point in age discrimination cases are three decisions, *Wise v. Olan Mills, Inc.,* 495 F. Supp. 257 (D. Colo. 1980) and *E.E.O.C. v. Sandia Corporation,* 639 F.2d 600 (10th Cir. 1980). The reasoning of both *Wise* and *Sandia* is in accord with the general collateral source rule that was adopted by the United States Supreme Court in *Gullet,* Supra. Both *Wise* and *Sandia* hold that to allow set-off of Social Security benefits would unjustly enrich the Defendant, since Social Security benefits are benefits that Plaintiff has earned during his lifetime. Defendants have claimed that under the circumstances the Plaintiff would be receiving a windfall if the Social Security benefits were allowed. However, it was clearly stated in testimony at Trial that Plaintiff was ready, willing and able to return to work for the Defendant thus obviating claim that there was somehow or another a windfall.

The Trial Court relied on the case of *Craig v. Y & Y Snacks, Inc.,* 721 F.2d 77 (3d Cir. 1983) in ruling on this

issue. Defendants acknowledge that there is recent authority to the effect that the reasoning under the *Craig v. Y & Y Snacks, Inc.*, Supra, also applies to A.D.E.A. cases but attempts to distinguish it because it involves other benefits such as Unemployment Compensation. It is interesting to note that the case that Defendants refer to as recent authority is the *McDowell,* Supra, decision specifically rules that Unemployment Compensation and other benefits are not to be allowed as set-offs in A.D.E.A. cases. It is also peculiar that Defendants would request the Court to consider *Ostapowicz,* supra, a valid statement of the law whereinUnemployment Compensation benefits were deducted as a set-off and the calculations merely approved by the Third Circuit without comment but would ask the Court not to consider *Craig v. Y & Y Snacks, Inc.* and *McDowell,* Supra, as relevant precedent because they involved the same Unemployment Compensation benefits.

Finally, to allow the Defendants to have Social Security benefits deducted as a set-off would be to render the A.D.E.A. practically useless in all but a very few cases. Under Defendants' theory, only a high-paid executive that earns well in excess of Social Security benefits has any real stake in pursuing an A.D.E.A. claim, since the amount of Social Security benefits received would be small in comparison to the displaced executive's former salary. Yet, the average working man that earned the same amount of money that Plaintiff did in the instant case, would be entitled to virtually no recovery, since recovery would only be for those amounts in excess of Social Security benefits. An entire work force of people with salaries in the moderate range could be fired with impunity, since Social Security benefits would substitute for such a large portion of these lost wages that the prospects of recovery would not seem worth the effort.

It should be further pointed out that in those cases involving Unemployment Compensation benefits set forth in Defendants' brief, the Courts held that it was

discretionery with the Court to allow the set-off of Unemployment Compensation benefits. Accordingly, the standard of review would require that this Court find ar abuse of discretion on the part of the Lower Court which obviously does not exist upon the face of the record.

Further, those cases involving set-offs concerning Unemployment Compensation benefits citied by Defendants *Wilson v. Wehadkee Yarn Mills*, 32 E.P.D. Sec. 33,776 (N.D. Ala. 1983) and *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981) can be distinguished on the base of the fact that these benefits are supplied and paid for entirely by the employer without contribution by the employee. Whereas, Social Security benefits are earned by an employee and contributed to during the employee's work life.

2. The Courts below properly permitted Plaintiff to present evidence of future damages or front pay damages beyond the Trial date.

Defendants accurately point out that the Trial Court reconsidered its decision after initially ruling against allowing the introduction of evidence concerning front pay. However, it is not surprising that the Court reversed its position after a careful reading of the decision of *Wehr v. Burroughs Corporation*, 619 F.2d 276 (3d Cir. 1980). At first glance, *Wehr*, Supra, seems dispositive of the issue in favor of Defendants. However, the full relevant quotation of *Wehr* is as follows:

> "We will not decide whether future damages may be awarded in A.D.E.A. cases, however, because we are persuaded that Wehr has removed this issue from consideration. Any basis for calculating front pay would include the amount Wehr would have received had he continued to be employed by Burroughs beyond the Trial date. Of necessity, Wehr's argument that he is entitled to future damages in lieu of reinstatement presuppose that he

> wanted to be reinstated. At Pre-Trial, however, Wehr specificaly disclaimed any desire for reinstatement. We, therefore, conclude that the question whether future damages may be properly recovered in A.D.E.A. cases is not properly before us at this time".

Initially it is important to note that the decision of future damages had not been decided by the Third Circuit before the case sub justice and, therefore, that Circuit relied upon other Circuit Courts for guidance and persuasive authority. Secondly, and more importantly, Plaintiff Wehr specifically and actively disclaimed any desire for reinstatement. Wehr, by his counsel, wrote a letter to the Court and to opposing counsel disclaiming any desire for reinstatement. Obviously, that factual circumstance is clearly not present in the instant case. Plaintiff requested in his Complaint both back pay and front pay, as well as any other remedial and equitable relief that the Court deemed proper. If front pay is "in lieu" of reinstatement, then the request for front pay obviously contemplates the Plaintiff's request for either reinstatement or front pay. Secondly, Defendants were aware of Plaintiff's intentions from the outset of the Trial to request front pay. Thirdly, the pleading requirements under the Federal Rules of Civil Procedure require notice pleading and not actual pleading as required in State Court. In *Everco Industries, Inc. v. O.E.M. Products Co.*, 18 F.R. Serv. 2d 1319, 63 F.R.D. 662 (N.D. Ill. 1974) that Court held that a precise computation or manner of proof of damages need not be alleged in the prayer for relief where the claim states the basis and nature of the alleged legal wrongs and the amount of damages cannot be ascertained without certainty at the time the claim is filed. Obviously, that principle should be applied in the instant case.

It is also amply clear that within the ambit of requesting front pay and requesting the Court to grant other equitable and remedial relief as it deemed proper in

both the Complaint and the Pre-Trial Order the Plaintiff put the Defendants on notice of their claim in requesting the Court to fashion an appropriate remedy. Nowhere did the Plaintiff actively abandon his claim for future lost wages as in *Wehr*, Supra, Plaintiff attempted to ask Defendant, David H. Sinclair, if he would allow reinstatement of the Plaintiff. Thereafter, there was an objection and ensuing discussion at side bar (Trial Transcript pages 6.6 to 6.12). During the side bar Plaintiff made it quite clear that there was a prayer for remedial relief in the Complaint; that in the liability phase of the Trial that the Plaintiff requested reinstatement; that front pay was requested in the Complaint and at the Pre-Trial. The Court upon considering this argument at a later point in the Trial looked at the practical impact of *Wehr* that would not allow front pay and stated as follows:

> "The reasoning of it (Wehr decision) does not overwhelm me because I don't hesitate to say to you that the longer a Plaintiff stays out of Court the more money he gets and that doesn't seem to me to be something that was intended . . . (Trial Transcript page 6.62)".

The Trial Court found that the instant case differed from *Wehr* factually based on the request in the Complaint for front pay and remedial relief and the active withdrawal of the Plaintiff in *Wehr* of that issue from the Court.

The sentiments expressed by the Lower Court were expressed in *Ventura v. Federal Life Insurance Company*, 571 F.Supp. 48 (N.D. Ill. 1983) wherein the Court recognized that reinstatement can be inappropriate where a Plaintiff could not be merged back into the Defendant's work force without animosity. It is obvious from testimony at Trial that such was the case with Defendant, Sinclair International. Mr. Maxfield was a salesman that had his territory taken from him and given to another salesman that worked that territory for a period

of over three (3) years prior to the date of the Trial. It would seem quite inappropriate under the present factual circumstances to try to merge the Plaintiff back into the same sales territory after three (3) years of absence from the job.

The *Ventura*, Supra, decision weighed the various pros and cons of allowing front pay and adopted the view of the most comprehensive decision on this point of law to date set forth in *Koyen v. Consolidated Edison Company of New York, Inc.*, 560 F.Supp. 1161 (S.D.N.Y. 1983). It is interesting to note that the *Ventura* Court allowed an award for future benefits and stated:

> "To hold that such benefits are never available would run counter to the remedial purpose of the A.D.E.A. (Citations omitted) and would ignore the authority given District Court to award equitable relief beyond the specific wage or salary losses attributable to a wrongful employment action".

In *Koyen*, Supra, the Southern District of New York has not ruled in favor of Defendants' position. Rather, the much cited and much respected opinion of Judge Weinfeld not only held that future damages were allowable but went on to add that the withdrawal of a request of a former employee for reinstatement did not bar any future monetary awards under the A.D.E.A. There is a comprehensive discussion at pages 1167 through 1169 in *Koyen* of the various arguments for and against the allowance of future damages and the need for requesting reinstatement. Initially the Court debunks the argument that because the Fair Labor Standard Act is incorporated into the A.D.E.A. and because there is no provision for future relief in the Fair Labor Standard Act as there is in Title VII cases that the Congress clearly intended no such relief. The *Koyen* Court held that the incorporation into the A.D.E.A. of the additional §29 U.S.C. 626 (b) allowing equitable and remedial measures broaden the

act beyond the Fair Labor Standards Act scope to effectuate the purposes of the A.D.E.A. and allow future damages.

This holding is also set forth in *Pavlo v. Stiefel Laboratories, Inc.*, 22 F.E.P. 489 (S.D.N.Y. 1979) wherein the Court held that the mere fact the A.D.E.A. was incorporated into the F.S.L.A. was not to restrict damages but rather to prevent the creation of another bureaucracy. In accord *O'Donnell v. Georgia Osteopathic Hospital, Inc.* 574 F. Supp. 214 (N.D. Ga. 1982).

The *Koyen* decision also disposes of the issue that future damages are speculative in nature. When it stated:

> ". . .(T)that extreme situations may be envisioned does not warrant denial of relief in appropriate cases. The problem is more imaginary than real. Courts and Juries are not without experience in assessing damages for future loss of earnings in breach of employment contract and personal injury cases. Each can readily be decided upon its individual facts . . . the mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability.
>
> 'The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created'. (Citation omitted)
>
> Moreover, to restirct the employee to losses sustained from the date of discharge to the date of the return of the verdict or entry of judgment would encourage the employee to delay the judgment date as long as possible."

Other cases in support of the fact that future damages are less speculative than claimed by Defendants consider the shortness of the period of time for which damages are requested as a relevant consideration on

this point. The Trial Court quite correctly noted in its decision to allow future damages that the claim was for the short period of time of twenty-one (21) months, and, therefore, not speculative. In *Ventura*, Supra, the Court held that an employee at age fifty-six (56) computing entitlement to a pension up to age sixty-two (62) would not be speculative (a total of six (6) years). In *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, Supra, a claim for four (4) years of wages from date of discharge to date of eligibility for retirement was held not to be speculative.

Finally, *Koyen*, Supra, addressed the prerequisite of formally demanding reinstatement of the Complaint. The Court in *Koyen* stated:

> "To foreclose prospective damage awards under that concept would mean that the employee is left with no choice but to seek reinstatement, a remedy which in particular cases may be undesirable or unwanted considering both of the employee's or the employer's interest. At page 1169".

Obviously, the Trial Court realized that there existed an inappropriate circumstance for the Plaintiff to seek reinstatement as a matter of fact. It is clear from the opinion of the Lower Court that there was an atmosphere of hostility between the Defendants and the Plaintiff. (Appendix Page 20) The Court specifically found that in this case reinstatement would be an undesirable remedy. In *Blim v. Western Electric Company, Inc.* 731 F.2d 1473 (10th Cir. 1984) that Court held that the atmosphere of hostility would make an award of reinstatement inappropriate and future damages more appropriate.

Furthermore, in *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir., 1984), the court awarded front pay to an involuntarily retired attorney. In that case, the Court held that the violation of the Age Discrimination in Employment Act was not willful and that reinstatement of the employee was infeasible due to animosity. The

Second Circuit held that it was within the discretion of the Trial Court to award front pay for the full period from Trial until the Plaintiff would reach age seventy (70). The Court emphasized that this involved a relatively short time period of approximately four (4) years. *Id.* at 729. This was the case because a period of four (4) years "did not involve some of the uncertainties which might surround a front pay award to a younger worker". *Id.*

For all of the foregoing reasons, it is apparent that Plaintiff's claim for future damages was appropriate and that Plaintiff did, in fact, claim equitable relief that encompassed reinstatement; and that it was within the discretion of the Court to award front damages instead of reinstatement due to the inappropriateness of the circumstances. It is further specifically submitted that the *Koyen* and *Whittlesey* decisions are dispositive on the issue of front pay in Age Discrimination in Employment Act cases.

3. The Court below did not err in permitting Plaintiff to present evidence regarding his front pay loss without the use of expert testimony.

Defendants complained that because Plaintiff voluntarily elected to present testimony concerning future wages without the use of an expert testimony that somehow Defendants have been prejudiced. It was clearly established at the time of Trial that Plaintiff had forty (40) years of work experience and knowledge of the territory. It was also clearly established at the time of Trial that Plaintiff's earning capacity in the year 1980 was $24,000. It was also clear that Plaintiff had an intimate working knowledge of his territory at the time of his discharge and that through direct and cross-examination all witnesses, including the defendants, agreed that the sales in the Maxfield territory after his discharge increased by at least ten percent (10%) per year based on

inflation. In fact, evidence from the Defendants' correspondence indicates that Defendant expected a ten percent (10%) increase each year which was acknowledged by the Defendants' witnesses. Therefore, there is a substantial basis and sufficient evidence for the Jury to conclude that the Plaintiff's salary and commissions would also increase each year based on an inflationary factor. However, Plaintiff elected not to ask the Jury for an increased amount of money each year to avoid unnecessary mathematics for the Jury and the need for an expert witness. Rather, Plaintiff asked for the same amount of money earned in the year 1980 for each of the subsequent years that followed.The sole issue in dispute with regard to future damages are those damages from February of 1984 until November of 1985. The issue resolves around whether or not the front pay amount requested was reduced properly to present value without the use of an expert witness. Mr. Maxfield requested wages from the years 1980 through February of 1984 for back pay without any increase for inflation with the Defendants' own evidence indicated at least a ten percent (10%) per year inflationary factor for the first three (3) years. Obviously, Plaintiff's failure to use an expert witness in that area benefitted the Defendants.

In addition, Plaintiff did not ask the court to award an inflated wage figure for front wages but agreed to use the same base salary figure in 1980 and agreed to discount the present value of the front wage figure for the years 1984 and 1985. This discounting of this front wage figure to present value was calculated at the rate of ten percent (10%) discount per year. It is admitted that the figure of ten percent (10%) was chosen as an arbitrary figure. However, the mere fact that it was arbitrary does not, in and of itself, disqualify the figure as being inappropriate for a Jury to render a verdict. Defendant in no way established by any evidence or legal argument that they have in any way been prejudiced by the use of the figure of ten percent (10%). Obviously, the Court

pointed out in its reasoning for this decision that the Defendants were getting the better part of the economic bargain of such mathematical computation.

The Trial Court took judicial notice of the well-known fact and the trial court's experience that at the time of Trial experts in the field were not predicting real interest rates in excess of ten percent (10%) per year, nor had such experts done so in the past. In fact, the court stated its opinion as a judicially noticed fact that over the past ten (10) years the real interest rate had never equalled or exceeded ten percent (10%) and that had often been below zero percent (0%).

It is well recognized that the Court is entitled to take judicial notice of economic circumstances. See *Skirvin v. Mesta,* 141 F.2d 668 (Cir. Ct. App. Okl. 1944) concerning depressed economic trend between 1932 and 1940); *Anderson v. U.S.,* 179 F.2d 281, (5th Cir. 1950), Cert. Den. 70 S. Ct. 1000, 339 U.S. 965 (1950) concerning increase in market values of land within government project areas).

The fact that the Plaintiff voluntarily elected to discount to present value with a generous discount figure should not work against the Plaintiff as Defendants suggest. Logical extension of the Defendant's argument is that they would like the case reversed because Plaintiff did not choose to have an expert come in and prove that the Plaintiff deserved a much greater amount than he otherwise received. Defendants cite the case *Kolb v. Goldring, Inc.,* 649 F.2d 869 (1st Cir. 1982) for the proposition that statistical and expert evidence is necessary to prove A.D.E.A. damages. That citation of the case is absolutely inapplicable and inappropriate. *Kolb* does not state that such testimony is necessary. It states that the evidence that Kolb produced to the Jury of future raises was speculative. Kolb requested and asked the Jury to infer that he would have received an $8,000 raise based on no patterns of past increase or similar evidence. However, in the instant case, Plaintiff was specifically asked

in the damage portion of the Trial to assess his earning capacity for the years 1984 and 1985 based on his experience on his former sales territory. Plaintiff voluntarily did not add in an inflationary figure and then voluntarily discounted his future lost wages, which certainly is to the Defendants' advantage and not to the Plaintiff's.

The *Kolb* Court in setting forth the requirement for A.D.E.A. evidence held that such awards can be based where projections have been on the base of expert testimony, or patterns of past increases or similar evidence. Initially, the Plaintiff testified the patterns of past increases and, secondly, he based his projections and discounting on similar evidence. The judicially noticed fact that the discount rate of ten percent (10%) would be more than fair to the Defendants and as such is similar evidence.

As the Court noted that the termination of future damages was relatively uncomplicated and that the evidence was more than sufficient to support a Jury's relatively modest award of $7,500 for future damages for the twenty-one (21) month period of time for a Plaintiff that earned well in excess of $20,000 a year immediately preceeding his termination. Accordingly, Plaintiff respectfully submits that the Jury verdict should be left undisturbed with regard to future lost wages.

4. Plaintiff did not fail to prove a prima facie case under the Age Discrimination in Employment Act. Further, Plaintiff need not prove a prima facie case when there is direct evidence of age discrimination, as in this case.

The Appellant must establish through the record that as a matter of law Plaintiff would not have been entitled to recover because no prima facie case existed. It is respectfully submitted that the requirement that a prima facie case must be proven was a short-hand method of establishing a circumstantial case of discrimination and

nothing more. *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 253 (1981). The method of proving an Age Discrimination in Employment violation and the "prima facie" case requirement was introduced into the Trial process to facilitate the production of a circumstantial case of discrimination, especially in a situation where proof by direct evidence of discrimination is close to impossible to unearth in the world of business and corporate employment practices.

A prima facie case is merely stating to the Court that there are circumstances that point to age discrimination. This, however, does not preclude the establishment of age discrimination by direct evidence as opposed to using circumstantial evidence of illegal discrimination. If there is direct proof of age discrimination then circumstantial evidence of a discrimination or the proof of a "prima facie" case is merely cummulative.

In the instant case, the record is clear that the only issue raised by the Defendants is that Plaintiff failed to prove one (1) of the four (4) elements of a prima facie case, i.e. that his employer retains someone to continue the Plaintiff's work who is not in the protected group *Rodrigues v. Taylor,* 569 F.2d 1231 (3rd Cir. 1977). By protected group, the Defendants argue that those people protected by the statute are those who are at least forty (40) years old but less than seventy (70) years of age. There is no argument under this claim of error below that Plaintiff did not establish that he was within the protected age claim; that he was qualified for the position for which he was terminated and was performing his job at an adequate level; and that he was discharged. The only issue is whether or not Plaintiff's replacement was within the protected age group and whether or not that is a requirement for the proof of a prima facie case.

However, where direct evidence of a discriminatory intent is shown there is no need for the proof of a prima facie case. In *Spagnpolo v. Whirlpool Corporation,* 461

F.2d 1109 (4th Cir. 1981) that Court held that a substitute for proof of a prima facie case would be the proof of direct evidence of a discriminatory intent. It is abundantly clear from the evidence and the Complaint that Plaintiff alleged and proved that there was direct discrimination when Plaintiff was informed that he would be terminated based on his attaining age sixty-five (65).

If Defendant's argument were to be taken to its logical conclusion, under Title VII cases for example which used the same standard as A.D.E.A. cases, an employer could discharge a black employee based on race and even state to that employee: "I am firing you because you are black, but I am hiring another black employee to take your place". Could that employer escape the consequences of his act by merely arguing that he is replacing one (1) person of a protected group with another person from the same group.

If such a requirement were true, an employer could fire otherwise qualified but independent-minded women, blacks, older Americans, Catholics, Jews and Hispanics and replace each of those members of a particular class with more docile members of the same protected group in spite of direct proof of discrimination. Obviously, that is not the intention of either Title VII or the A.D.E.A. The intention of the Act is to prevent arbitrary age discrimination in employment, 29 U.S.C. §621 (a) and (b). Therefore, the use of the four (4) criteria to prove a prima facie case is a method of establishing age discrimination when direct proof is not present. Here, direct proof was present and the Jury determined that there was sufficient evidence to render a verdict against the Defendants.

Even assuming that the Defendants are correct that there is a need to prove a "prima facie" case in each case before submission to a Jury, the Plaintiff still has clearly established a prima facie case. Since the first three (3) elements of a prima facie case are not in dispute, it must

be assumed that Plaintiff has established all those elements. Therefore, only the fourth (4th) element as set forth in *Rodrigues v. Taylor,* Supra, is in dispute.

With regard to the necessity of proving the fourth (4th) element, the Lower Court reasoned that the purpose of this act would not be met if an employer could at any time replace an employee approaching age seventy (70) with someone just over age forty (40) and escape the consequences of the act. To allow such result would most likely facilitate more illegal activity than otherwise occurs. Defendants cite the *Rodrigues v. Taylor,* Supra, case as dispositive of the issue. However, nowhere in that opinion can the language requiring a person to be within the protected group be found. In fact, there is language just to the contrary to be found in the Eastern District of Pennsylvania District Court decision in *Berkowitz v. Allied Stores of Penn-Ohio, Inc.,* 541 F. Supp. 1209 (E.D. Pa. 1982) the Court stated the fourth (4th) criteria as: "the position was filled with a younger employee". The Court cited as its authority *Smithers v. Lailar,* 629 F.2d 892, 894-95 (3d Cir. 1980) This *Smithers,* Supra, Court used the criteria "Younger than Plaintiff". It should also be pointed out that the decisions relied upon by Defendants are at times inapposite to the particular factual situation present in this case or to the present state of the law. The *Rodrigues,* Supra, decision is a pre-*Burdine* decision and speaks of shifting burdens of proof which clearly renders this characterization of prima facie case inaplicable to the present state of the law. Also, the Defendants cite *Harping v. Continental Oil Company,* 628 F.2d 406 (5th Cir. 1980), cert. denied, 102 S. Ct. 100; *Houser v. Sears, Roebuck & Co.,* 627 F.2d 756 (5th Cir. 1980); *Mizrany v. Texas Rehabilitation Commission,* 522 F. Supp. 611 (D.C. Tex. 1981), affirmed, 685 F.2d 1385. These cases are all Fifth Circuit cases. However, Defendants fail to update this Court on the present state of the law in the Fifth Circuit. In *Elliott v. Group Medical and Surgical Services,* 714 F.2d 556

(5th Cir. 1983) the Fifth Circuit now lists, in the alternative, several options for the fourth (4th) disputed criteria to set forth a prima facie case. These options are as follows:

> "(4) the Plaintiff was replaced by someone outside a protected class; *or* (Citations omitted) (5) by someone younger, *Wilson v. Sealtest Foods*, 501 F.2d 84 (5th Cir. 1974); or (6) show otherwise that his discharge was because of his age, *McCuen v. Home Insurance Company*, 633 F.2d 1150 (5th Cir. 1981)"

Therefore, the case relied upon by the Defendants in the Fifth Circuit are no longer applicable since the Circuit now recognizes both of the situations Plaintiff has argued and proved at Trial. First it recognizes that the Plaintiff was replaced by a "younger employee" and secondly, the prima facie case may be established if direct proof of age discrimination otherwise exists. See also on this point *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981) and *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

To make the argument of the Defendants even less plausible are the statements by various Circuit Courts and this Court that the four (4) criteria should not be rigidly applied. *McDonnell-Douglas v. Green*, 411 U.S. at 802, note 13; *Garner v. Borstin*, 690 F.2d 1034 (D.C. Cir. 1982); *Anderson v. Savage Laboratories, Inc.*, 675 F.2d. 1221 (11th Cir. 1982).

The fact pattern complained of in the instant case existed also in *Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983) wherein a fifty-three (53) year old man was replaced by a forty (40) year old man. Obviously, the forty (40) year old man was within the protected class and the Court without directly ruling on the issue held that the fourth (4th) requirement was met when the position remained open to people with similar qualifications and in no way held, as the Defendants suggest, that

this Court should now hold. See also *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805 (D. Colo. 1983); *Jacobson v. Pitman-Moore, Inc.*, 573 F. Supp. 565 (D. Minn. 1983); *Rubis v. McGraw-Edison Company Power Systems Division*, 570 F. Supp. 27 (W.D. Pa. 1983). In all three (3) cases, the Court specifically used the word "younger employees" and not the "protected age group" language.

It is respectfully submitted that the weight of the case law is in support of Plaintiff's position as well as the weight of the rationale and the purpose of the act along with the reasoning set forth by the Trial Court in its opinion.

CONCLUSION

Respondent respectfully requests that this Petition for Certiorari be denied.

RESPECTFULLY SUBMITTED,
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